

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

EASTERN DIVISION

No. 05-10849RGS

DOROTHY STANLEY, EXECUTRIX OF THE
ESTATE OF HELEN A. RUNGE,

Plaintiff

v.

WALTER J. KELLY,
KERRY L. BLOOMINGDALE, M.D., and
SUNBRIDGE NURSING AND
REHABILITATION CENTER,

Defendants

**DEFENDANT WALTER J. KELLY'S MOTION FOR JUDGMENT AS A
MATTER OF LAW ON COUNT XII (BREACH OF CONTRACT) AND COUNT
XIII (BREACH OF FIDUCIARY DUTY)
AT THE CLOSE OF PLAINTIFF'S EVIDENCE**

NOW COMES the Defendant, Walter J. Kelly, ("Kelly"), pursuant to Fed. R. Civ. P. 50(a) and moves this Court for judgment as a matter of law in favor of the Defendant on the breach of contract (Count XII) and breach of fiduciary duty (Count XIII) claims as they are duplicative of the negligence claim (Count III), which is essentially a legal malpractice claim. As grounds in support of this motion, Defendant submits the following:

1. Plaintiff has put forth claims of negligence, breach of contract and breach of fiduciary duty against her former attorney, Defendant Walter Kelly.
2. As a matter of law, the negligence (Count III), breach of fiduciary duty (Count XIII) and breach of contract counts (Count XII) are all essentially a claim for legal malpractice. See Fall River Savings Bank v. Callahan, 18 Mass. App. Ct. 776, 81-82, 463 N.E.2d 555 (1984); Van Brode Group v. Bowditch & Dewey, 36 Mass. App. Ct.

509, 517 (Mass. App. Ct. 1994); Callahan v. Foley, 2007 Mass. Super. LEXIS 432 (Sept. 26, 2007)(dismissing the plaintiff's negligence, breach of fiduciary duty and breach of contract counts for lack of a legal malpractice expert because the facts giving rise to these claims were the same).

3. The Plaintiff alleges the same facts in support of the negligence, breach of contract and breach of fiduciary duty counts, and therefore the breach of contract and breach of fiduciary duty counts are duplicative of the negligence count, and they should be dismissed.

WHEREFORE, the Defendant, Walter J. Kelly, requests that this Honorable Court grant his motion for judgment as a matter of law in favor of Defendant on the breach of contract (Count XII) and breach of fiduciary duty (Count XIII) claims of Plaintiff's Second Amended Complaint.

Respectfully submitted,

The Defendant,
Walter J. Kelly,
By his attorneys,

/s/ Michele Carlucci

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Dated: June 26, 2008

CERTIFICATE OF SERVICE

I, Michele Carlucci, certify that on June 26, 2008, I have served a copy of the forgoing to all counsel of record by hand and by electronic filing:

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/s/ Michele Carlucci
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